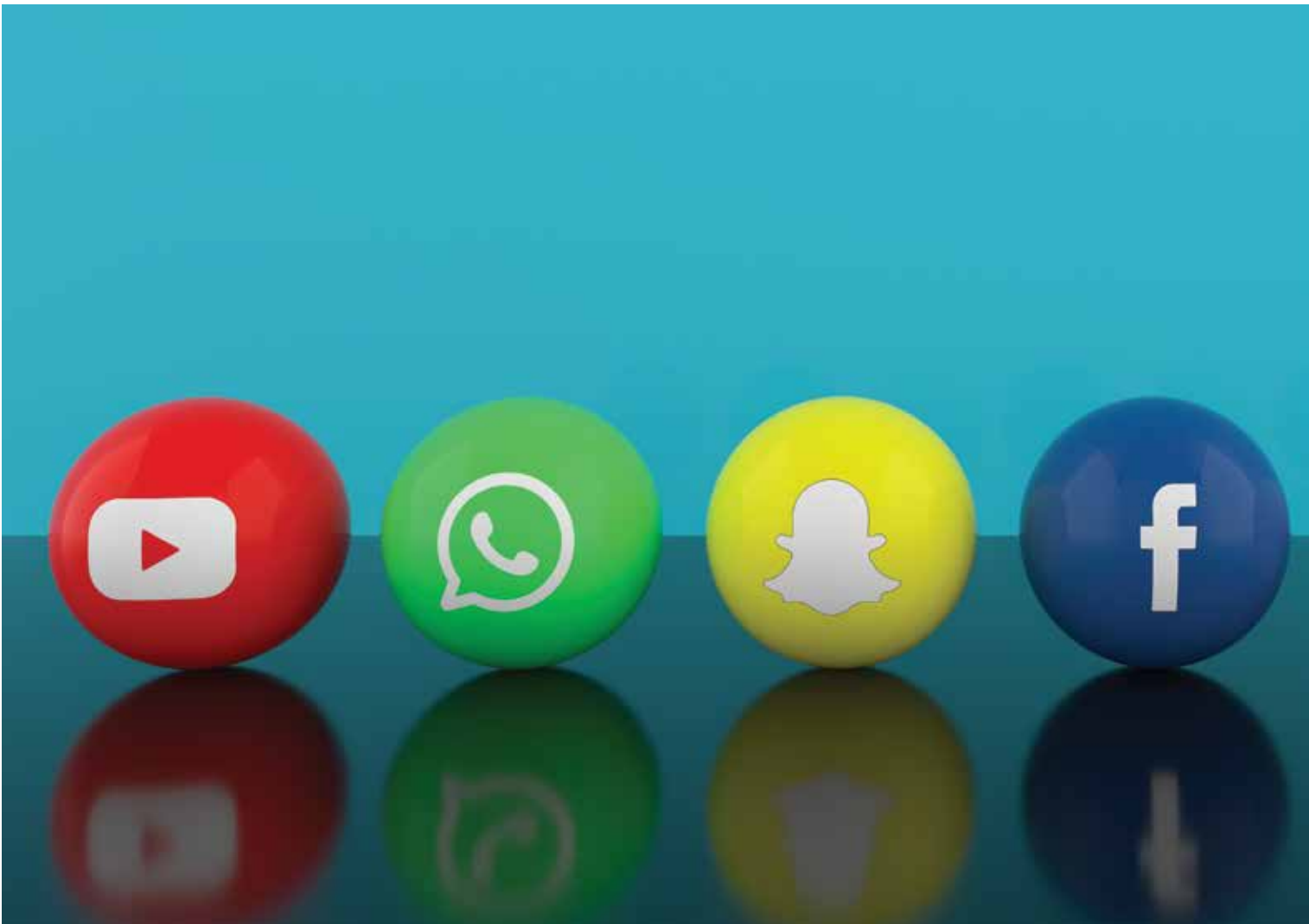


# The First Amendment and Local Government Use of Social Media

By Lisa A. Anderson

## At a Glance

Public comments posted on official, government-run social media pages should not be blocked, deleted, or hid; yet determining whether a social media page is an official page on which public comment has been invited may depend on the specific circumstances presented. When in doubt, do not delete, and consult with legal counsel.



It comes as no surprise that social media sites have seen a dramatic rise in the number of users since the coronavirus outbreak. As businesses and government offices have temporarily closed and people have taken to their homes to avoid getting sick and slow the spread of the virus, record numbers of people turned to the internet and social media to stay connected to friends and family and informed about current events. During these unprecedented times, local government leaders and agencies moved quickly and did an exceptional job in transitioning government business to a virtual model to ensure that information was communicated to citizens, public health was protected, and public engagement could continue.

Before the pandemic, social media use by government officials and agencies was on the rise, with many public agencies using multiple social media platforms to reach the widest possible audience. It is not difficult to understand why. It is estimated that roughly 70 percent of Americans use social media

regularly and get some news from social media sites.<sup>1</sup> Before the coronavirus outbreak, Facebook averaged 1.62 billion daily active users,<sup>2</sup> and the public was consuming more than one billion hours of video on YouTube every day.<sup>3</sup> Those numbers, while staggering, rose significantly during quarantine.

As the public sector's use of social media platforms has expanded, complicated questions have developed over how and to what extent the First Amendment applies to content posted on social media sites. Several recent cases shed light on the issue.

### Is social media the new town square?

If freedom of speech is considered the lifeblood of democracy, some would say that social media is fast becoming one of the most important venues for expressing personal views. In 2017, the United States Supreme Court in *Packingham v North Carolina* portrayed social networking sites like Facebook and Twitter as the modern public square—essentially a digital version of a public street or park.<sup>4</sup>

*Packingham* involved a North Carolina criminal statute that made it a felony for registered sex offenders to access internet and social networking sites that minors were known to frequent, including commonly used sites like Facebook, Twitter, and Instagram. After concluding that the statute was not narrowly tailored to serve the state's compelling interest in protecting children from predatory internet activity, the Supreme Court struck the criminal statute on First Amendment grounds.

Writing for the majority, Justice Anthony Kennedy explained that the internet in general and social media in particular have become the most important spaces in modern society for public discourse.<sup>5</sup> The Court ruled that by broadly prohibiting registered sex offenders from accessing common social media sites like Facebook, Twitter, and Instagram, the North Carolina statute prevented people from accessing some of the most important sources of information available on current events, employment, and other vital topics, and posed an unprecedented constraint on free speech.<sup>6</sup> The sharply divided opinion drew strong criticism from concurring justices, who characterized the majority's portrayal of social media as a public forum as undisciplined dicta.<sup>7</sup>

### Local government use of social media

The full significance of the *Packingham* ruling remains to be seen. Some commentators have theorized that *Packingham*'s expansive language—and particularly its framing of the internet as a public forum—opened a Pandora's box by implying, with little analysis, that the public forum doctrine applies to privately owned social networking platforms.<sup>8</sup> To help put this into context, with few exceptions, the public forum doctrine has historically been reserved for government-owned property traditionally opened for public assembly and debate,



like public streets and parks.<sup>9</sup> In addition, the doctrine has also been applied to public property designated by the government as a place for expressive activity.<sup>10</sup> Applying the public forum doctrine to *privately owned* social media platforms represents a significant departure from the historical application of the doctrine and in many respects overlooks the dual public-private nature of digital forums.<sup>11</sup>

Several courts have recently considered, with mixed results, whether the First Amendment and the public forum doctrine apply to social media sites maintained by the public sector. *Morgan v Bevin* was one of the early cases to consider the issue.<sup>12</sup> In *Morgan*, plaintiffs sued the governor of Kentucky for First Amendment violations after the governor allegedly blocked plaintiffs from his official Facebook and Twitter pages because they posted comments critical of his policies. The court found that Facebook and Twitter are privately owned communication channels that were not transformed into a public forum simply because the governor used the sites for official government business.<sup>13</sup>

Getting to the root of the matter, the court explained that Facebook and Twitter accounts are unlike any type of property traditionally protected by First Amendment forum analysis law.<sup>14</sup> The court concluded that the governor's Facebook and Twitter accounts were intended only to communicate the governor's speech, not the speech of others.<sup>15</sup> In reaching this conclusion, the court observed that specific limits were set on the public's ability to comment on the governor's Facebook and Twitter accounts. In addition, the governor limited public comment to agenda items only.<sup>16</sup> The public was invited to respond to the governor's posts but was not welcome to initiate posts of their own. As a result of these restrictions, the court concluded that the governor's use of privately owned social media accounts was personal speech, and because the governor was speaking on his own behalf—even on his own behalf as a public official—the First Amendment did not apply.<sup>17</sup>

Not long after *Morgan*, the Fourth Circuit Court of Appeals reached a different conclusion in *Davison v Loudoun County Board of Supervisors*.<sup>18</sup> Unlike *Morgan*, the court in *Davison* expressed no reluctance about applying First Amendment forum analysis to a social media account operated by a public official. The court, after considering the principles of forum analysis, concluded that the chair of the County Board of Supervisors created a public forum for free speech when she opened her official Facebook page to comments from the public on any topic of public interest.<sup>19</sup>

The court first determined that the chair operated the Facebook page in her official capacity as a public official. Relevant to this issue, the chair designated the Facebook page as belonging to a government official, listed her government contact information on the official Facebook page, and used the page to provide information to the public about government activities.<sup>20</sup> In addition, the chair invited public feedback on the Facebook page on any issue without limitation.<sup>21</sup>

The court next evaluated the portions of the Facebook page reserved for public comment. While the Facebook page in its entirety may not operate as a public forum, the court found that the interactive space on the page specifically reserved for public comment created a public forum for free speech that was subject to First Amendment principles.<sup>22</sup> The court ruled that the chair engaged in viewpoint discrimination in violation of the First Amendment when she banned the plaintiff from accessing the official Facebook page because she disagreed with his posted comments.<sup>23</sup> The court's analysis relied on a Second Circuit decision that has since been reversed, and on *Packingham's* undisciplined dicta.<sup>24</sup>

On the heels of *Davison*, the Second Circuit Court of Appeals in *Knight First Amendment Institute v Trump* applied First Amendment forum analysis and found that the president of the United States created a public forum for free speech when he used his Twitter account for official government business and made its interactive features accessible to the public for comment without limitation.<sup>25</sup> Although the Twitter account was originally operated as a private account long before the president took office, the court found that it was transformed into an official government account in part because it was maintained with the help of government employees and was used by the president in his official capacity to promote government business.<sup>26</sup>

The Court in *Knight* concluded that when a public official holds out a social media page as an official account for conducting government business, and makes public interaction a prominent feature of the site, the account is public, not private, and users should not be excluded because of the viewpoints they express.<sup>27</sup>

## The Sixth Circuit weighs in

Recognizing the different approaches taken in *Morgan* and *Davison*, the Sixth Circuit Court of Appeals in *Novak v City of Parma* recently granted qualified immunity to two police officers accused of deleting comments on an official police Facebook page.<sup>28</sup> The court found that at the time the Facebook comments were deleted, courts had not reached consensus over how First Amendment protections would apply to comments posted on social media sites.<sup>29</sup> As a result, the plaintiffs did not have a clearly established right to post comments on the police department's official Facebook page and the officers were entitled to qualified immunity.<sup>30</sup> In *Hyman v Kirksey*, the court held that the law was still not clearly established as of spring 2018.<sup>31</sup>

## Takeaways

Several key observations can be made despite the differing approaches taken by courts on the application of First

Amendment principles to social media sites. First, as a general rule, when public comment is invited on an official social media site, comments should not be blocked, deleted, or hid based on the content or viewpoint expressed. If in doubt, do not delete and consult with legal counsel.

Second, the United States Supreme Court and Sixth Circuit Court of Appeals have stressed the importance of moving slowly and circumspectly in applying First Amendment precedents to the internet, recognizing that the internet changes so rapidly that what courts say today may be obsolete tomorrow.<sup>32</sup>

A third and final observation is that, while not always the case, the occasional work-related comment posted on a public employee's *personal* social media page has generally not been sufficient to transform a personal social media page into an official page for First Amendment purposes.<sup>33</sup> Courts review the totality of the circumstances and consider multiple factors when determining whether a social media account maintained by a public official is a public, not private, account.<sup>34</sup>

Factors relevant to the totality of circumstances inquiry include whether the social media account was operated for a public purpose, was used primarily as a tool of governance to communicate about government activities, and was clothed in the trappings of public office. An account may be clothed in the trappings of public office if, among other things, the official identifies the social media account as a government account and uses it for government purposes, includes his or her official title and public office contact information on the social media page, and relies on the help of government employees and public resources to maintain the account.<sup>35</sup>

## Summary

Developing a strong social media policy is an essential step in establishing specific guidelines for the appropriate use of social media sites. Social media policies should be reviewed regularly and revised as needed as technology continues to change and local governments innovate and expand their use of social media sites. ■



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## ENDNOTES

1. *Social Media Fact Sheet*, Pew Research Center (June 12, 2019) <<https://www.pewresearch.org/internet/fact-sheet/social-media/#how-often-americans-use-social-media-sites>> [<https://perma.cc/B2HX-6QB6>] and *News Use Across Social Media Platforms 2018*, Pew Research Center (September 10, 2018) <<https://www.journalism.org/2018/09/10/news-use-across-social-media-platforms2018/>> [<https://perma.cc/D7TB-PLDB>]. All websites cited in this article were accessed May 30, 2020.
2. *Facebook Reports Third Quarter 2019 Results*, Facebook, Inc. (October 30, 2019), available at <[https://s21.q4cdn.com/399680738/files/doc\\_financials/2019/q3/FB-Q3-2019-Earnings-Release.pdf](https://s21.q4cdn.com/399680738/files/doc_financials/2019/q3/FB-Q3-2019-Earnings-Release.pdf)> [<https://perma.cc/S964-D8VP>] and *Packingham v North Carolina*, 137 S Ct 1730, 1735; 198 L Ed 2d 273 (2017) (estimating the number of active Facebook users as 1.79 billion).
3. Goodrow, *You know what's cool? A billion hours*, Official Blog, YouTube (February 27, 2017) <<https://youtube.googleblog.com/2017/02/you-know-whats-cool-billion-hours.html>> [<https://perma.cc/9BKH-RJNZ>].
4. *Packingham*, 137 S Ct at 1735–1737.
5. *Id.* at 1735.
6. *Id.* at 1737. The Court left open the possibility that a more narrowly tailored law may survive intermediate scrutiny ("[T]his opinion should not be interpreted as barring a state from enacting more specific laws than the one at issue.").
7. *Id.* at 1738.
8. Note, *First Amendment—Freedom of Speech Public Forum Doctrine—Packingham v North Carolina*, 131 Harv L Rev 233, 233 (2017).
9. *Perry Education Ass'n v Perry Local Educators' Ass'n*, 460 US 37, 45; 103 S Ct 948; 74 L Ed 2d 794 (1983); *Cornelius v NAACP Legal Defense & Ed Fund, Inc.*, 473 US 788, 800; 105 S Ct 3439; 87 L Ed 2d 567 (1985). But see *Marsh v State of Alabama*, 326 US 501; 66 S Ct 276; 90 L Ed 265 (1946) (a privately owned company town functioned like a public town for First Amendment purposes).
10. *Perry*, 460 US at 45 and *Miller v City of Cincinnati*, 622 F3d 524, 534 (CA 6, 2010).
11. *First Amendment—Freedom of Speech Public Forum Doctrine* at 238. This article does not address the Communications Decency Act of 1996.
12. *Morgan v Bevin*, 298 F Supp 3d 1003 (ED Ky, 2018).
13. *Id.* at 1010–1011.
14. *Id.* at 1011.
15. *Id.*
16. *Id.* at 1008, 1011.
17. *Id.* at 1011.
18. *Davison v Randall*, 912 F3d 666 (CA 4, 2019).
19. *Id.* at 688.
20. *Id.* at 683.
21. *Id.* at 686.
22. *Id.* at 687.
23. *Id.* at 688.
24. *Manhattan Community Access Corp v Halleck*, 139 S Ct 1921, 1928; 204 L Ed 2d 405 (2019) (a private company operating public-access channels on Manhattan's cable system was not transformed into a state actor for First Amendment purposes simply by providing a forum for speech).
25. *Knight First Amendment Inst v Trump*, 928 F3d 226 (CA 2, 2019).
26. *Id.* at 236.
27. *Id.* at 236, 239.
28. *Novak v City of Parma*, 932 F3d 421 (CA 6, 2019).
29. *Id.* at 434.
30. *Id.*
31. *Hyman v Kirksey*, No. 3:18-cv-230, slip op at 2 (ED Ark, May 30, 2019).
32. *Packingham*, 137 S Ct at 1736, 1744 (encouraging courts to move cautiously and circumspectly in applying First Amendment principles to the internet because "[t]he forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.") and *Novak*, 932 F3d at 434.
33. *German v Eudaly*, unpublished opinion and order of the United States District Court of Oregon, Portland Division, issued June 29, 2018 (No. 3:17-cv-2008-MO).
34. *Knight, Davison, and One Wisconsin Now v Kremer*, 354 F Supp 3d 940, 951 (WD Wis, 2019).
35. *One Wisconsin Now*.